

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

\* \* \* \* \*

In the matter of the complaint )	
of Phil Forner against )	Case No. U-16273
<u>Consumers Energy Company.</u> )	

**NOTICE OF PROPOSAL FOR DECISION**

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on July 25, 2011.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before August 15, 2011, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before August 29, 2011. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN ADMINISTRATIVE HEARING  
SYSTEM  
For the Michigan Public Service Commission

---

Sharon L. Feldman  
Administrative Law Judge

July 25, 2011  
Lansing, Michigan

STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

\* \* \* \* \*

In the matter of the complaint     )  
of Phil Forner against                )  
Consumers Energy Company.        )

Case No. U-16273

**PROPOSAL FOR DECISION**

**I.**

**PROCEDURAL HISTORY**

This PFD addresses the April 28, 2010 complaint of Phil Forner against Consumers Energy Company. Mr. Forner's complaint alleged that Consumers Energy violated MCL 460.10a in accounting for its Appliance Service Plan (ASP) during the time period May 1, 2004 through December 31, 2005, and requested relief.

At the September 21, 2010 prehearing conference, Mr. Forner, Consumers Energy, and Staff appeared and agreed on a schedule for the case. Pursuant to that schedule, Mr. Forner filed testimony on December 8, 2010; Consumers Energy filed the testimony of one witness, Gary Van Ochten, on January 11, 2011; and Mr. Forner filed rebuttal testimony on March 15, 2011. At the evidentiary hearing on April 12, 2011, both Mr. Forner and Mr. Van Ochten testified and were cross-examined. Also pursuant to the established schedule,

Mr. Forner, Consumers Energy, and Staff filed briefs on May 17, 2011, and reply briefs on June 7, 2011.

The record is contained in 65 pages of transcribed testimony and 9 exhibits, Exhibits PF-1 through PF-6, PF-9, and CE-1 and CE-2. The record and the positions of the parties are discussed in more detail below.

## II.

### **OVERVIEW OF THE RECORD AND DISPUTED ISSUES**

Mr. Forner's direct testimony first reviewed the cases he has participated in before the Commission, including Case Nos. U-13089, U-13830, U-13948, U-14329, U-15245, and U-15645.<sup>1</sup> Each of these cases addressed at least in part Consumers Energy's operation of or accounting for its ASP.

Mr. Forner then testified to his understanding of the statutory provisions applicable to the ASP, focusing on 2004 PA 88, MCL 460.10a(5)-(11). Referring to the electric utility operations of Consumers Energy as the "Electric Utility", he testified that the Electric Utility provides the following services to the ASP:

Billing of the ASP on the monthly Electric Utility bill; receiving/processing of the monthly payments for the ASP program with the electric bill payments; and call center phone support relating to the ASP; in addition to other services being provided.<sup>2</sup>

---

<sup>1</sup> Mr. Forner's testimony is transcribed at 2 Tr 12-30.

<sup>2</sup> See 2 Tr 17.

In Mr. Forner's view, MCL 460.10a(7) requires the ASP to "pay the Electric Utility for all direct and indirect costs of services used calculated on the percentage used by the ASP compared to that used by the Electric Utility."<sup>3</sup>

Focusing on billing costs, Mr. Forner relied on discovery information provided by Consumers Energy to testify that the company sent out 2,969,846 monthly utility bills that contained ASP charges during the 20-month time span of his complaint. From cost information provided by the company, he concluded that the total cost for delivering the monthly utility bills that included ASP charges was \$1,003,570, including the bill, data processing, printing, and stationary, as well as postage costs. Mr. Forner reasoned that the monthly bill is used for two purposes, delivering the electric bill and delivering the ASP bill, and he therefore concluded that the ASP should "pay" the Electric Utility half of the total billing cost, or \$501,785.<sup>4</sup>

For the related category of costs associated with receiving and processing monthly bill payments, Mr. Forner also looked to information he received from Consumers Energy. Based on this information, Mr. Forner testified that the costs of receiving and processing each payment is \$0.1364; using the same reasoning noted above, he further concluded that the ASP should "pay" the Electric Utility half of this cost, or a total of \$202,543.<sup>5</sup>

Mr. Forner next relied on information regarding the number of ASP-related phone calls and the average cost per call to determine that a total of \$1,036,740

---

<sup>3</sup> See 2 Tr 16.

<sup>4</sup> See 2 Tr 17.

<sup>5</sup> See 2 Tr 18.

in call center costs should be assigned to the ASP program. Mr. Forner's calculations resulted in a total cost of \$1,036,740 for this category for the applicable time period, which he asserts the ASP should "pay" the Electric Utility.

In addition to the total of the foregoing bill-related and call center costs of \$1,741,069, Mr. Forner testified that "interest" costs or "the time value of money" also should be added as an additional amount "due the Electric Utility from the ASP" for an approximately five-year period: "The 2004-2005 Electric Utility rates should have been reduced by this amount 5+ years ago."<sup>6</sup>

Next, he testified regarding the "program margin", which refers to the amount by which revenues received from ASP customers exceed the costs assigned to the ASP program. He stated his position that MCL 460.10a(10) requires the "program margin" generated by electric customers taking service under the ASP program to reduce or offset electric rates.<sup>7</sup> Relying on an estimate that electric customers comprise 40% percent of the total ASP enrollment, he contended 40% of the "program margin" should go to the electric utility.

Finally, he testified that he is not seeking "economic damages" as a form of relief in this case, but is seeking compensation for his time, at the rate of \$70 per hour, which he testified was done in Case Nos. U-13830 and U-13948.

Mr. Forner introduced Exhibits PF-1 through PF-6, discovery responses received from Consumers Energy containing information regarding customer

---

<sup>6</sup> See 2 Tr 18.

<sup>7</sup> See 2 Tr 19.

counts, allocation and accounting methods, and expense allocations for 2004, 2005, and 2006. Mr. Forner also presented Exhibit PF-9, identifying the time he had put into this case up to the hearing date, with estimated amounts for the hearing and briefing time.

Mr. Van Ochten testified for Consumers Energy.<sup>8</sup> Mr. Van Ochten is the ASP Operations Manager, responsible for managing the day-to-day activities of Consumers Energy's ASP, including program marketing, employee development, training, safety, and contract administration, as well as equipment and part procurement, planning, budgeting, financial reporting, and regulatory compliance.<sup>9</sup> His direct testimony reviewed the history of the current ASP program from its beginning as the "Heating Security Plan" in 1988.

He testified that the purposes of the program were both economic and safety oriented, to reduce the employee down-time and corresponding costs associated with maintaining adequate staff to respond to natural gas leaks within 30 minutes, and by training employees in appliance repair, to help reduce customer injuries and company liability. Mr. Van Ochten explained that because the program began as a program to utilize the time of its gas employees, it used the assets of the company's gas utility operations, including labor, vehicles, tools, and equipment.<sup>10</sup> Mr. Van Ochten explained that the ASP program is accounted for under the company's gas utility operations for these reasons.

---

<sup>8</sup> Mr. Van Ochten's testimony is transcribed at 2 Tr 32-63.

<sup>9</sup> See 2 Tr 36.

<sup>10</sup> See 2 Tr 38.

Mr. Van Ochten testified that he is responsible for the financial reporting associated with the ASP. He testified to his understanding of MCL 460.10a, including the Code of Conduct adopted by the Commission under MCL 460.10a(4), and the requirements enacted by 2004 PA 2008. He explained that the company keeps separate books and records for the ASP program and makes these books and records available to the Commission on request, to comply with MCL 460.10a(6b).<sup>11</sup>

He further testified to his understanding that MCL 460.10(7) does not require Consumers Energy to “pay” or reimburse the Company’s electric utility operations for expenses incurred by the ASP.<sup>12</sup> Mr. Van Ochten acknowledged that some services that are shared between the company’s gas and electric operations are used to conduct the ASP operations, but testified that equity between the gas and electric operations is preserved because costs for those shared services are split between electric and gas based on an established formula. Regarding the costs of providing these shared services to the ASP operation, Mr. Van Ochten explained:

It is difficult to determine the exact cost of using the services mentioned above to determine how often an electric versus gas customer utilizes ASP services. Electric only customers account for approximately 15% of all ASP customers. Combination gas and electric customers account for approximately 26% of ASP customers. Splitting these costs between energy types would be challenging and prone to differing interpretations of the methodology used to calculate cost.

---

<sup>11</sup> See 2 Tr 40.

<sup>12</sup> See 2 Tr 40-41.



Mr. Van Ochten explained his opinion that the company is currently allocating billing costs adequately, relying in part on his understanding of the record and the Commission's decisions in Case Nos. U-14329, U-15245, and U-15645.<sup>13</sup> Mr. Van Ochten believes the Commission has already resolved the treatment of postage as a billing cost.<sup>14</sup> Responding to Mr. Forner's claim that billing costs should be split equally between utility operations and the ASP program, he further testified that the amount of ASP Program involvement with the utility bill for ASP customers is only 7.8%, and that billing costs are correspondingly allocated to the ASP program.

He testified that call center costs are also being allocated to the ASP, indicating that the call center allocation was \$637,863 from May 1 to December 31, 2004, and \$760,704 for 2005, for a total cost of \$1,408,567. Mr. Van Ochten testified to his understanding that "interest" is not an item of cost to be accounted for under MCL 460.10a. And he addressed Mr. Forner's testimony regarding the "program margin", providing his understanding that neither the Code of Conduct nor 2004 PA 88 require the margin from the ASP program to be allocated to electric customers or used to offset electric rather than gas rates.<sup>15</sup> Finally, he testified to his opinion that the Commission should not provide further compensation to Mr. Forner for the time he has spent bringing this complaint.<sup>16</sup>

---

<sup>13</sup> See 2 Tr 42-43.

<sup>14</sup> See 2 Tr 43, 45.

<sup>15</sup> See 2 Tr 44-45.

<sup>16</sup> See 2 Tr 45-56.

Mr. Van Ochten also presented Exhibits CE-1 and CE-2, showing a breakdown of direct and indirect costs allocated to the ASP for the period of Mr. Forner's complaint in 2004 and 2005, as well as the program revenues.

Mr. Forner cross-examined Mr. Van Ochten regarding the company's accounting for the ASP costs, including questions regarding interrogatory responses Mr. Van Ochten had provided in Exhibits PF-1 through PF-6.

Mr. Forner also presented rebuttal testimony. In his rebuttal testimony, he took issue with Mr. Van Ochten's testimony, alleging that Consumers Energy is illogical and inconsistent in its interpretation of MCL 460.10a. He further discussed the Commission's decisions in Case Nos. U-13089, U-13830, U-14329, U-15245 and U-15645, arguing that by requiring Consumers Energy to reduce electric rates to reflect a past unlawful subsidy in the amount of \$430,000, the Commission has established a precedent that the "Electric Utility" is to receive compensation when the ASP uses "Electric Utility assets and personnel."<sup>17</sup>

Mr. Forner addressed Mr. Van Ochten's breakdown of the ASP customers into the categories of electric-only, gas-only, and combined. He revised his opinion of the appropriate allocation of billing costs from the utility's electric operations to the ASP from \$501,785 to \$162,243.<sup>18</sup> Likewise, he revised his opinion of the appropriate allocation of bill payment processing costs from \$202,543 to \$65,489.<sup>19</sup> He testified that the customer categorization data

---

<sup>17</sup> See 2 Tr 22.

<sup>18</sup> See 2 Tr 23.

<sup>19</sup> See 2 Tr 23.

presented by Mr. Van Ochten also reduced his opinion of the appropriate allocation to the ASP of customer call center costs from \$1,036,740 to \$290,287.<sup>20</sup>

Mr. Forner's rebuttal testimony also took issue with Mr. Van Ochten's stated understanding that MCL 460.10a does not address how costs or profits should be allocated between gas and electric customers of the utility, and with Mr. Van Ochten's understanding that the Commission's decision in Case No. U-14329 governs the allocation of billing costs in this proceeding.<sup>21</sup> To Mr. Forner, Case No. U-14329 dealt only with the allocation of costs over the period 2001-2003, and he contends that billing and other costs change over time. Further, he contended that the enactment of 2004 PA 88 post dated the Commission's decision in Case No. U-14329, and provided explicit legislative direction mandating the result he advocates, going beyond the requirements of the Code of Conduct applicable in Case No. U-14329.

Turning to Mr. Van Ochten's explanation for the derivation of the current cost allocations for billing costs, and his explanation that only 7.8% of a utility bill including an ASP charge relates to the ASP program, Mr. Forner contended:

Basing the 7.8% allocation on the number of lines on the monthly utility bill that are used by the ASP compared to the overall available lines fails to recognize that the monthly utility bill's purpose is more than just lines on the bill and is inconsistent with CEC's allocation of billing costs between the Electric Utility and the Gas Utility.

---

<sup>20</sup> See 2 Tr 23-24. Note that this modification reduces the total costs Mr. Forner contends should be allocated from the "Electric Utility" to the ASP from \$1,741,069 (at 2 Tr 18) to \$518,019 (\$162,243 + \$65,489 + \$290,287).

<sup>21</sup> See 2 Tr 24-25.

According to CECo, when the Electric Utility and the Gas Utility jointly use the monthly bill they split the allocation of cost equitably, 50%-50%. However CECo proposes that when the Electric Utility and ASP use the same monthly bill the Electric Utility should account for 92.2% of the billing cost and the ASP only needs to account for 7.8%; which is not equitable and creates an Electric Utility subsidy.<sup>22</sup>

Mr. Forner also responded in his rebuttal testimony to Mr. Van Ochten's testimony regarding postage costs, explaining that he believes that postage costs should be allocated to the ASP under MCL 460.10a(8).<sup>23</sup> And finally, Mr. Forner addressed Mr. Van Ochten's testimony regarding Mr. Forner's request to be reimbursed for his time spent bringing this complaint:

[A]s an Electric Utility customer I have suffered damages in the form of higher than should be Electric Utility rates and the loss of time participating in this proceeding is very time consuming; I've spent over 50 hours already in this proceeding. If the Commission would order CECo to refund the Electric Utility subsidies along with compensating me at \$70 per hour for all of the time this proceeding takes, like the Commission has done in two previous proceedings, [it] does make me whole.<sup>24</sup>

In his initial brief, Mr. Forner argues that subsection 7 through 9 of MCL 460.10a clearly require that Consumers Energy allocate all of its electric utility costs that are directly attributable to the ASP to that program, "thereby reducing the electric utility costs and eventually electric utility rates". Mr. Forner's brief reviews the history of several Commission decisions finding that Consumers Energy violated the Code of Conduct adopted pursuant to MCL 460.10a(4). These decisions include Case Nos. U-13089, U-13830 and U-13948.

---

<sup>22</sup> See 2 Tr 26.

<sup>23</sup> See 2 Tr 27.

<sup>24</sup> See 2 Tr 27.

He separately identifies the facts he believes are relevant to this proceeding:

The Electric Utility and Gas Utility operate separately but in coordination and cooperation with each other. (2 TR 41)

The Gas Utility voluntarily chooses to operate the ASP. (2 TR 36)

The Electric Utility chooses to . . . offer the ASP to Electric Utility customers for voluntary participation as authorized by MCL 460.10a(5).

The Electric Utility provides to the ASP monthly billing services, as authorized by MCL 460.10a(8), to those Electric Utility customers who enroll in the ASP. Specifically the Electric Utility includes charges for the ASP on the monthly Electric Utility bill for enrolled customers. (2 TR16-17)

The Electric Utility provides to the ASP a monthly payment processing service for those Electric Utility Customers who pay for the ASP with their monthly Electric Utility bill. (Exhibit PF-1 and PF-2)

The Electric Utility provides to the ASP on-going call center support, which includes providing perspective customers with marketing information regarding the ASP. (2 TR 16-17)

The Electric Utility rates do not include any allocation from the ASP. (2 TR 52 and Exhibit PF-5)

The Gas Utility receives all the pre-tax operating income ("PTOI") from the ASP, including the PTOI earned from the Electric Utility customers who voluntarily enroll in the ASP. (2 TR 44-45)<sup>25</sup>

Mr. Forner then argues the following:

All electric utility billing costs directly attributable to the ASP must be allocated to the ASP;<sup>26</sup>

All electric utility payment processing costs directly attributable to the ASP must be allocated to the ASP;<sup>27</sup>

---

<sup>25</sup> See Forner brief, pages 4-5.

<sup>26</sup> See Forner brief, pages 5-6.

<sup>27</sup> See Forner brief, page 6.

All electric utility call center costs directly attributable to the ASP must be allocated to the ASP;<sup>28</sup> and

The electric utility should receive its fair share of the PTOI.<sup>29</sup>

Mr. Forner also seeks to recover his costs for bringing this complaint, as discussed in his testimony, at the rate of \$70 per hour.<sup>30</sup>

In its initial brief, Staff also chronicles the past proceedings involving Consumers Energy's ASP program costs and revenues, including a review of the Commission's decisions in Case Nos. U-12134, U-13089, U-14329, U-15245, and U 15645, and two decisions of the Michigan Court of Appeals.<sup>31</sup> Staff concludes that Consumers Energy has complied with the requirements of MCL 460.10a(5)-(11), including the requirements of MCL 460.10a(6) and (7). Staff indicates that in the decisions cited, the Commission has previously addressed these issues and determined that the cost allocations described by Mr. Van Ochten comply with the statutory requirements, that postage costs need not be assigned to the ASP if no incremental costs are incurred, and that the ASP revenues may be used to offset gas rates rather than electric rates.

In its initial brief, Consumers Energy reviews each of the cost elements challenged or identified by Mr. Forner. With regard to billing-related costs, Consumers Energy asserts that allocated costs to the ASP program include the amounts the company allocated as shown on Exhibits CE-1 and CE-2, as well as the additional amounts the Commission ordered in Case Nos. U-14329,

---

<sup>28</sup> See Forner brief, pages 6-7.

<sup>29</sup> See Forner brief, page 7.

<sup>30</sup> See Forner brief, pages 8-9, Exhibit PF-9.

<sup>31</sup> *Attorney General v MPSC (In re Application of Consumers Energy for Rate Increase)*, \_\_\_ Mich App \_\_; \_\_\_ NW2d \_\_\_ (2010); *Forner v MPSC*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2008 (Docket No. 270941).

U-15245, and U-15645. With regard to call center costs, Consumers Energy argues that the company allocated \$1,408,567 in call center costs to the ASP program, more than the \$1,036,740 that Mr. Forner claims should be allocated, and that Mr. Forner's real dispute is not with the cost allocation to the ASP, but with the rate treatment of the ASP program:

[MCL 460.10a(7)] provides guidance to the ASP Program as to how to calculate the proper allocation of expense to the ASP Program . . . but does not mandate that the ASP Program divide up its allocation and pass some of it to the electric utility and some of it to the gas utility and some of it to the general corporate accounts of the Company.<sup>32</sup>

The company asserts that it has properly allocated direct and indirect costs and expenses against the ASP revenues, while the company's allocation of joint and common assets and revenues and expenses between the company's electric and gas operations assures that those expenses are shared equally between the operations.

In both its brief and reply brief, Consumers Energy further argues that the appropriate treatment of postage and interest, as well as the "program margin" have already been established by the Commission's orders in Case Nos. U-14329 and U-15245, and the Court of Appeals subsequent decisions affirming the Commission.<sup>33</sup> Consumers Energy attached the Court of Appeals decisions to its initial brief.<sup>34</sup> Consumers Energy attached to its reply brief the appellate brief Mr. Forner filed in appealing the Commission's order in

---

<sup>32</sup> See Consumers Energy brief, page 7.

<sup>33</sup> *Attorney General v MPSC (In re Application of Consumers Energy for Rate Increase)*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2010); *Forner v MPSC*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2008 (Docket No. 270941).

<sup>34</sup> See Attachments B and C.

Case No. U-15245, and the exceptions he filed to the PFD in Case No. U-15645.<sup>35</sup>

Responding to Mr. Forner's references to the ASP program as being required to "pay" the electric utility, Consumers Energy again emphasizes its position that MCL 460.10a does not require any subsidiary, affiliate, or department of Consumers Energy "compensate" or "pay" anything to any other entity, but rather deals with a cost allocation for purposes of determining whether a subsidy exists. Consumers Energy also contends ratemaking treatment at the Commission is appropriate because of the integral connection of the ASP program to the company's gas operations.

Finally, Consumers Energy asks that Mr. Forner be sanctioned for raising frivolous arguments. Consumers Energy points to the Court of Appeals decisions addressing postage and interest. Consumers Energy also contends that Mr. Forner's arguments are in large part based on the premise that the gas and electric operations of the company are separate, while he long ago advocated the position that for purposes of the Code of Conduct, there was no difference between the company's gas utility in which the ASP was housed and operated, and the electric utility.

In its reply brief, Staff agrees with Consumers Energy that Exhibits CE-1 and CE-2 show that Consumers Energy appropriately allocated costs to the ASP for the time period at issue. Staff also reiterates its position that the Commission

---

<sup>35</sup> See Attachments B and C.



has already decided the issues raised by Mr. Forner, and the Commission's decisions have been affirmed by the Court of Appeals.

In his reply brief, Mr. Forner argued that because MCL 460.10a(5) applies expressly to "electric utilities", it requires that "electric utility" costs be allocated to the ASP, and therefore that the "electric utility" be reimbursed for those costs. Mr. Forner also asserts that Staff misinterpreted his position in stating that this case does not involve allegations that the Company failed to properly allocate costs between its regulated and unregulated entity; he clarified that he does contend that postage is not being properly allocated to the ASP. Additionally, he contends that Consumers Energy's reliance on the Court of Appeals decisions regarding the postage costs is improper because those decisions were based on facts prior to the effective date of 2004 PA 88.

### **III.**

#### **DISCUSSION**

There is no dispute that Consumers Energy may lawfully operate an ASP and may lawfully offer the ASP service to its utility customers, as long as Consumers Energy complies with the requirements of MCL 460.10a(5)-(11). Indeed, MCL 460.10a(5) explicitly provides:

An electric utility may offer its customers an appliance service program. Except as otherwise provided by this section, the utility shall comply with the code of conduct established by the commission under subsection (4). As used in this section, "appliance service program" or "program" means a subscription

program for the repair and servicing of heating and cooling systems or other appliances.

In contrast to prior cases involving the ASP, Mr. Forner does not contend that Consumers Energy is violating the Code of Conduct established by the Commission under MCL 460.10a(4). Nor does he dispute that Consumers Energy is in compliance with MCL 460.10a(6), which requires:

A utility offering a program under subsection (5) shall do all the following:

- (a) Locate within a separate department of the utility or affiliate within the utility's corporate structure personnel responsible for the day-to-day management of the program.
- (b) Maintain separate books and records for the program, access to which shall be made available to the Commission upon request.
- (c) Not promote or market the program through the use of utility billing inserts, printed messages on the utility's billing materials, or other promotional materials included with the customers' utility bills.

Mr. Van Ochten testified that he is responsible for the day-to-day management of the ASP, and is responsible for operating the ASP in compliance with applicable laws and regulations. He further testified that the ASP maintains separate books and records, and that these are routinely made available to the Commission for review. Also, he testified that the ASP does direct mail marketing now. Mr. Forner did not challenge this testimony.

Instead, what is at issue in this complaint case is whether Consumers Energy adequately accounted for the costs associated with the ASP. Mr. Forner contends that Consumers Energy violated provisions of MCL 460.10a(7)-(9) during the time period May 1, 2004 through December 31, 2005, by failing to

allocate sufficient costs to the ASP program. For the reasons explained below, Mr. Forner has not shown that Consumers Energy violated any of these provisions.

A. Rate levels and MCL 460.10a

First, although Mr. Forner's complaint alleges violations of MCL 460.10a(7)-(9), much of Mr. Forner's argument is not directed to these requirements, but instead states a dispute with how rates are set for electric and gas customers of the utility. Because some of the resources Consumers Energy uses to provide the ASP service are resources otherwise used in part to provide electric utility service, he argues that the company's electric utility rates should be reduced to reflect his calculation of the costs attributable to the ASP's use of those resources, and to reflect what he views as a proportional share of the "net margin" or profit for the ASP program. Mr. Forner has maintained this position in numerous cases at the Commission, including Case Nos. U-15245 and U-15645, both Consumers Energy rate cases.

But as Consumers Energy and Staff argue, MCL 460.10a does not impose requirements on the Commission in setting electric and gas rates, beyond the requirement stated in MCL 460.10a(10) that if the Commission includes ASP revenues in setting utility rates, it must also include the offsetting ASP costs. The Court of Appeals recognized this in reviewing the Commission's decision in Case No. U-15245: "The statutory provisions governing the operation

of ASPs are distinct from those governing ratemaking.”<sup>36</sup> Had the Court of Appeals not recognized this distinction, a review of MCL 460.10a(10) makes clear that the Commission is not required to consider ASP costs or revenues in setting rates for regulated utility services:

[MCL 460.10a] does not prohibit the commission from requiring a utility to include revenues from an appliance service program in establishing base rates. If the commission includes the revenues of an appliance service program in determining a utility's base rates, the commission shall also include all of the costs of the program as determined under this section.

Instead, the focus of the cost allocation requirements of MCL 460.10a is to ensure that the utility operations do not subsidize the ASP. MCL 460.10a(4) states:

No later than December 2, 2000, the commission shall establish a code of conduct that shall apply to all electric utilities. The code of conduct shall include, but is not limited to, measures to prevent cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services, whether those services are provided by the utility or the utility's affiliated entities.

If the revenues received for the ASP service exceed the allocated costs, MCL 460.10a(7) declares that no subsidy exists: “A subsidy by a utility does not exist if costs allocated as required by this subsection do not exceed the revenue of the program.”

Thus, in an inquiry to determine whether a utility has complied with the cost allocation requirements of MCL 460.10a, how the company's utility rates have been set is not relevant. A utility does not violate MCL 460.10a by charging

---

<sup>36</sup> *Attorney General v MPSC (In re Application of Consumers Energy for Rate Increase)*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2010).

rates approved by the Commission. And, as Consumers Energy and Staff argue, there is no requirement in MCL 460.10a that a utility's ASP "pay" its electric utility operations based on the statutorily required cost allocations.

In the context of this case, therefore, since Mr. Forner argues that the company violated MCL 460.10(7)-(9), the inquiry must be whether the total cost allocations to the ASP are consistent with the statutory requirements, and if so, whether the ASP revenues exceed those costs.

B. Cost allocations

Reviewing Mr. Forner's analysis, he has not shown that Consumers Energy has allocated too few dollars of costs to the ASP as reflected in Exhibits CE-1 and CE-2. For the years in question, Consumers Energy has allocated costs to the ASP, as shown in Exhibits CE-1 and CE-2 and PF-3. These exhibits show a total allocation of direct costs to the ASP of \$12.5 million for the time period identified in the complaint, and an allocation of indirect costs of \$21.7 million for the same period. Against this backdrop, Mr. Forner argues for an allocation of \$518,209 in costs he attributes to the ASP share of billing, bill processing, and call center costs otherwise assigned to the company's electric operations, and he seeks interest on these amounts and a share of the net margin of the ASP program as well. Each of these items is discussed in turn below.

## 1. Bill-related costs

As shown on Exhibits CE-1, CE-2, and PF-3, Consumers Energy allocated at least \$200,950 for bill-related costs for the pertinent time period.<sup>37</sup> Mr. Forner contends that the company should have allocated \$162,243 in bill processing costs plus an additional \$65,489 in bill payment processing costs, attributable to electric utility operations alone.<sup>38</sup>

Mr. Forner bases his cost allocations on information supplied by the company showing costs of \$0.05645 to issue each bill, plus \$0.28147 per bill for postage, and \$0.1364 to process each bill payment. Using these per unit cost elements, he proposes an allocation formula attributing 50% of the total cost for electric-only customers to the ASP, and 33% of the total cost for combined electric and gas utility customers to the ASP. The postage cost issue is addressed first in subsection a; the allocation formula Mr. Forner advocates in addressed in subsection b.

### a. Postage Costs

As Consumers Energy and Staff argue, the Commission has repeatedly rejected Mr. Forner's contention that postage costs associated with the monthly bills should be allocated to the ASP. In Case No. U-14329, the Commission found that there were no direct postage costs attributable to the ASP program, even when Consumers Energy included marketing materials with its utility bills, because the ASP-related materials did not increase the postage the utility would

---

<sup>37</sup> See, e.g., \$79,150 shown on PF-3 labeled Case No. U-13830, plus \$121,800 shown on PF-3 labeled "billing allocation".

<sup>38</sup> See Forner, 2 Tr 23.

otherwise have paid. In Case No. U-15245, the Commission reiterated this conclusion. The Commission's decisions have been affirmed by the Court of Appeals. In affirming the Commission's decision in Case No. U-14329, the Court of Appeals held:

The PSC's determination that Consumers' ASP program should not be charged for postage because the postage subsidy created when Consumers includes an ASP program advertising insert in its regular billing envelopes is zero is a rational exercise of Consumers' ability to set rates, is not arbitrary and capricious, and is not inconsistent with other decisions.<sup>39</sup>

Indeed, in affirming the Commission's decision in Case No. U-15245, the Court of Appeals indicated that its prior decision on this issue should be given preclusive effect:

Concerning Forner's argument about subsidization of postal costs, this Court earlier concluded that "[t]he PSC's determination that Consumers' ASP program should not be charged for postage because the postage subsidy created when Consumers includes an ASP program advertising insert in its regular billing envelopes is zero is a rational exercise of Consumers' ability to set rates, is not arbitrary and capricious, and is not inconsistent with other decisions." . . . If the PSC's treatment of that issue were legislative in nature, this Court's disposal of it was an adjudication that triggered the preclusion doctrine. The PSC properly eschewed consideration of that issue anew.<sup>40</sup>

Mr. Forner, however, contends that none of the prior cases have addressed postage costs under 2004 PA 88, because those cases dealt with Consumers Energy's conduct prior to the April 22, 2004 effective date of that statute. Mr. Forner has not established that this is the case. Note that the Commission's decision in Case No. U-14329 was issued on February 9, 2006;

---

<sup>39</sup> *Forner v MPSC*, unpublished opinion per curiam of the court of Appeals, issued February 19, 2008 (Docket No. 270941), slip op p 5.

<sup>40</sup> *Attorney General v MPSC (In re Application of Consumers Energy for Rate Increase)*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2010), slip op pp 10-11.

the Commission's decision in Case No. U-15245 was issued on June 10, 2008. The Court of Appeals affirmed these decisions in orders dated February 19, 2008 and December 14, 2010, as cited above.

But even if the Commission and the Court of Appeals had not had ample opportunity to consider the requirements of 2004 PA 88, Mr. Forner does not explain how the provisions of 2004 PA 88 require a different result. In this context, Mr. Forner argues that MCL 460.10a(8) requires postage costs to be allocated based on percentage of use. MCL 460.10a(8), however, requires only that postage costs be allocated as required by MCL 460.10a(7). This subsection, in turn, only requires the direct and indirect costs of "employees, vehicles, equipment, office space, and other facilities used in the appliance service program" to be allocated based on the percentage of use by the program, as compared to the total use. There is no statutory requirement that postage costs be allocated based on percentage of use.

Thus, consistent with the Commission's prior determinations, as affirmed by the Court of Appeals, Consumers Energy is not required to allocate postage costs to the ASP where, as here, including the ASP charges on the utility bill does not cause the utility to incur additional postage costs, i.e. where there are no postage costs directly attributable to the ASP line items.

b. Allocation Formula

Mr. Forner next contends that costs to issue the bill, including postage, and costs to process bill payments should be split equally between the ASP program and the "Electric Utility" for those customers taking electric service only



from the utility, and split in equal thirds when customers take both electric and gas service from Consumers Energy as well as the ASP program. Mr. Forner relies on the provision of MCL 460.10a(7) requiring that certain direct and indirect costs be allocated based on percentage of use, and contends that the allocation he proposes is the only “equitable” way to share the costs. In his view, the only purpose of the electric and gas bills (aside from ASP charges) is to state the total amount owed.

This limited view of the purpose of the bills, however, significantly ignores the numerous billing requirements imposed by statute, Commission regulation, and tariff on Consumers Energy.<sup>41</sup> These billing requirements are not trivial; many of the required elements convey information the Legislature and/or Commission have determined to be important to utility customers, totally unrelated to the ASP program. Moreover, although the company may not lawfully market the ASP program through its bills, the company is free to include information regarding its utility programs, including information on energy optimization programs, the “Green Generation” program first adopted in Case No. U-13029,<sup>42</sup> safety, and any amount of other information unrelated to the ASP program.

Consumers Energy’s analysis, reflected in Exhibit PF-2, justifies an allocation of 1.9% of billing costs to the ASP based on the lines used to state the ASP charge (2 including a spacing line) as a percentage of the total lines on the

---

<sup>41</sup> See, e.g., MCL 460.1045(2), (5), and (6); 2007 AC, R 460.123, R 460.132, R 460.146, and R 460.148.

<sup>42</sup> See July 25, 2001 order.

bill (104).<sup>43</sup> Mr. Van Ochten testified that the company now uses a higher figure of 7.8% to allocate these costs.<sup>44</sup>

Consistent with MCL 460.10a, the Commission has broad authority to determine the appropriate formulas and methods to use in allocating costs. As the Commission has recognized, cost allocations are imperfect: “[A]ny allocation methodology is imprecise. In the final judgment, the question is not whether a more exact methodology can be constructed. Rather, the question is whether the method and result are reasonable.”<sup>45</sup> For the reasons stated above, Mr. Forner has not shown the company’s analysis to be unreasonable.

Even if the Commission were to accept Mr. Forner’s analysis of a reasonable allocation of bill issuing and bill payment processing costs, however, once postage costs are excluded from the calculation in accordance with the Commission’s prior decisions, the remaining bill-related cost allocation sought by Mr. Forner is only \$92,447. Because this is significantly less than the amounts the company has allocated to the ASP for bill-related costs, at least \$200,950 as discussed above, Mr. Forner has failed to show that any adjustment of the bill-related cost allocation is warranted.

## 2. Call-center costs

Mr. Forner also seeks an allocation of \$290,287 to the ASP, which he attributes to usage of the call center by the ASP customers who take electric

---

<sup>43</sup> See also Van Ochten, 2 Tr 49-51, 61-62.

<sup>44</sup> See 2 Tr 44.

<sup>45</sup> See Case Nos. U-10149, U-10150 (October 28, 1993 order), pages 101-102.

service from Consumers Energy.<sup>46</sup> But the company already allocates at least \$1,408,567 to the ASP for call center costs,<sup>47</sup> and Mr. Forner has not disputed that allocation. Because the company already allocates significantly more for the call-center costs in total than Mr. Forner has identified attributable to electric operations, Mr. Forner has failed to show that the company's allocation is inadequate.

### 3. Interest

Mr. Forner also contends that Consumers Energy should consider interest costs as part of the allocation. As discussed above, Mr. Forner's view is that the ASP should pay interest to the company's electric operations. Putting aside the payment issue, however, as Consumers Energy argues, there is nothing in section 10a that requires an allocation to the ASP of interest on the other costs allocated to the ASP. In affirming the Commission's decision on this point in Case No. U-15245, the Court of Appeals explained:

The cited subsections of MCL 460.10a in turn call for the PSC to establish a code of conduct for electric utilities to prevent "cross-subsidization, information sharing, and preferential treatment, between a utility's regulated and unregulated services," and authorize an electric utility to offer an ASP. Given that these authorities merely set forth certain goals and methods for reaching them, with no provision for remedies for any failures of compliance, Forner's argument that those authorities require an assessment of interest whenever rates are adjusted to compensate for improper subsidization of an ASP is strained.<sup>48</sup>

---

<sup>46</sup> See 2 Tr 16-17; Forner brief, pages 6-7.

<sup>47</sup> See Van Ochten, 2 Tr 44, and Exhibits CE-1, CE-2 and PF-3: Consumers Energy allocated call center costs of \$647,863 for May through December 2004 plus \$760,704 for 2005.

<sup>48</sup> *Attorney General v MPSC (In re Application of Consumers Energy for Rate Increase)*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (2010), slip op p 10.

#### 4. Program margin or PTOI

The remaining cost item Mr. Forner addresses is the “program margin”, or pre-tax operating income (PTOI) of the ASP. This difference between the ASP revenues and allocated costs is shown on Exhibits CE-1, CE-2 and PF-3 for the applicable time period as \$8,546,999. Mr. Forner contends that the electric utility should receive a share of the PTOI, rather than having the program margin offset gas utility rates only. In response, Mr. Van Ochten chronicled the history of the program as it arose out of the company’s gas utility operations, as described above, to explain why the Commission has considered the ASP revenues in setting gas utility rates.

But more germane to this case, Mr. Forner has not identified any statutory requirement that any of the revenues associated with the ASP be used to offset electric utility rates. As discussed in section A above, subsection 10a(10) permits the Commission to consider such revenues, but does not require the Commission to do so. Moreover, the Commission has clearly addressed this issue in recent rate cases, and the question should by now be considered settled.

#### C. Statutory compliance

Although the foregoing discussion explains that Mr. Forner has failed to identify any deficiency in Consumers Energy’s cost allocations to its ASP, the following review of the statutory sections identified in Mr. Forner’s complaint is provided.

MCL 460.10a(7)

This subsection provides:

All costs directly attributable to an appliance service program allowed under subsection (5) shall be allocated to the program as required by this section. The direct and indirect costs of employees, vehicles, equipment, office space, and other facilities used in the appliance service program shall be allocated to the program based upon the amount of use by the program as compared to the total use of the employees, vehicles, equipment, office space, and other facilities. The cost of the program shall include administrative and general expense loading to be determined in the same manner as the utility determines administrative and general expense loading for all of the utility's regulated and unregulated activities. A subsidy by a utility does not exist if costs allocated as required by this subsection do not exceed the revenue of the program.

The company's accounting for ASP costs as required by this section for the time period covered by the complaint is contained in Exhibits CE-1, CE-2 and PF-3. For the reasons discussed above, Mr. Forner has failed to show that any of the cost allocations reflected in these exhibits are understated or inconsistent with the requirements of this subsection. There are no direct costs associated with postage that are attributable to the ASP; other direct and indirect billing-related costs have been allocated to the ASP based on an analysis of their percentage of use. Exhibits CE-1, CE-2 and PF-3 also reflect an allocation of the administrative and general costs, labeled as corporate costs, which Mr. Forner did not challenge.

The exhibits show that the ASP earned revenues in excess of the cost allocations. Because the costs over this time period did not exceed the revenue of the program, a subsidy of the ASP by the utility does not exist under this subsection.

MCL 460.10a(8)

This subsection provides:

A utility may include charges for its appliance service program on its monthly billings to its customers if the utility complies with all of the following requirements:

- (a) All costs associated with the billing process, including the postage, envelopes, paper, and printing expenses, are allocated as required under subsection (7).
- (b) A customer's regulated utility service is not terminated for nonpayment of the appliance service program portion of the bill.
- (c) Unless the customer directs otherwise in writing, a partial payment by a customer is applied first to the bill for regulated service.

As explained above, Mr. Forner has failed to show that the utility does not allocate all costs associated with the billing process, as required by MCL 460.10a(7).

MCL 460.10a(9)

This subsection states:

In marketing its appliance service program to the public, a utility shall do all of the following:

- (a) The list of customers receiving regulated service from the utility shall be available to a provider of appliance repair service upon request within 2 business days. The customer list shall be provided in the same electronic format as such information is provided to the appliance service program. A new customer shall be added to the customer list within 1 business day of the date the customer requested to turn on service.
- (b) Appropriately allocate costs as required under subsection (7) when personnel employed at a utility's call center provide

appliance service program marketing information to a prospective customer.

(c) Prior to enrolling a customer into the program, the utility shall inform the potential customer of all of the following:

(i) That appliance service programs may be available from another provider.

(ii) That the appliance service program is not regulated by the commission.

(iii) That a new customer shall have 10 days after enrollment to cancel his or her appliance service program contract without a penalty.

(iv) That the customer's regulated rates and conditions of service provided by the utility are not affected by enrollment in the program or by the decision of the customer to use the services of another provider of appliance repair service.

(d) The utility name and logo may be used to market the appliance service program provided that the program is not marketed in conjunction with a regulated service. To the extent that a program utilizes the utility's name and logo in marketing the program, the program shall include language on all material indicating that the program is not regulated by the commission. Costs shall not be allocated to the program for the use of the utility's name or logo.

Although Mr. Forner cites this section in his complaint, the only portion of this subsection that he addresses concerns the allocation of call center costs, referred to in subpart (b). As discussed above, the utility allocated call center costs of approximately \$1.4 million to the ASP, substantially more than the \$290,287 Mr. Forner contends should be allocated to cover usage by ASP customers who are also electric customers of the utility. Thus, Mr. Forner has not shown that the total allocation of call center costs is unreasonable. As to the remainder of the subsection, there is no evidence on this record that would

suggest Consumers Energy violated these provisions during the applicable time period.

MCL 460.10a(10)

This subsection provides:

[MCL 460.10a] does not prohibit the commission from requiring a utility to include revenues from an appliance service program in establishing base rates. If the commission includes the revenues of an appliance service program in determining a utility's base rates, the commission shall also include all of the costs of the program as determined under this section.

As discussed above, although Mr. Forner contends that this subsection requires the Commission to include ASP costs and revenues in setting base rates for electric customers, the section only requires that if the Commission includes revenues, it must include the offsetting costs. Mr. Forner has not established that Consumers Energy violated this subsection.

**IV.**

**CONCLUSION**

Based on the foregoing discussion and findings, this PFD recommends that the Commission dismiss Mr. Forner's complaint because he has not shown that Consumers Energy violated MCL 460.10a.

All contentions of the parties not specifically addressed and determined herein are rejected, the Administrative Law Judge having given full consideration to all evidence of record and arguments in arriving at the findings and conclusions set forth in this Proposal for Decision.



MICHIGAN ADMINISTRATIVE HEARING  
SYSTEM  
For the Michigan Public Service Commission

---

Sharon L. Feldman  
Administrative Law Judge

July 25, 2011  
Lansing, Michigan  
drr